# What Comes After Neoliberalism?

Poul F. Kjaer 2020-08-31T07:30:00

The Law of Political Economy: Transformation in the Function of Law establishes the law of political economy as a particular field of scholarly enquiry. The timing for this endeavour is not coincidental. The post-WWII liberal constitutional settlement is being challenged or possibly outright breaking down before our eyes. From the financial crisis over the Eurozone crisis, the European migrant crisis, the challenge to rule of law in Hungary and Poland, Brexit and the Trump Presidency to the still ongoing health crisis and the socio-economic fallout following from it, large parts of Europe and the Western world at large seems to be moving into Weimar territory. Institutions and norms assumed certain are increasingly challenged or outright collapsing and overall societal coherency waning.

The post-WWII settlement however consisted of two very different movements: First the establishment of (trans-)national neo-corporatist frameworks of embedded liberalism in the North Atlantic area of world society from 1945 onwards. Secondly, the emergence of a neoliberal *épistémè* which, after a long incubation period dating back to before the foundation of the The Mont Pelerin Society in 1947, experienced its breakthrough with the Thatcher (1979) and Reagan (1981) administrations.

Neoliberalism is in many ways an empty signifier which one can read many different positions into. Believers of 'pure capitalism' will even deny its very existence. When used in its broadest possible sense it might be considered an umbrella concept of the dominant, hegemonic if you wish, economic and political theories and praxes from the 1970s until today. Concretely neoliberalism might thus be understood as both a paradigm and praxes of knowledge in relation to a whole string of areas and phenomenon's such as 'governance', 'new public management', 'law and economics', 'monetarism' but also, somewhat controversially, 'global human rights' and 'global justice'.

In more narrow legal terms, one might also introduce a distinction between interwar corporatist law, post-WWII neo-corporatist law and contemporary governance law. Alternatively, Duncan Kennedy, one of the contributors to The Law of Political Economy argued back in 2006 that the world of modern globalized law consisted of three epochs: German Classical Legal Thought (1850 – 1914); French Social Law (1914 – 68) and what might be called an US-centric globalizing legal paradigm from 1968 till the 2000s. That latter paradigm probably imploded somewhere between the 2008 financial crisis and today. Irrespective of the preferred division of epochs, the current health crisis seems to accelerate a more fundamental transformation underway for some time now. To put it short: The collapse of the neoliberal *épistémè* means we are witnessing the end of an epoch and looking into an unknown future.

This begs the questions, what will come after neo-liberalism? As Thomas Kuhn noted on the basis of insights harvested from Ludwik Fleck and Arthur Koestler; "a scientific theory is declared invalid only if an alternate candidate is available to take

its place". This insight explains the "strange death of neo-liberalism" as the neo-liberal *épistémè* continued as the world's caretaker government for another decade after the implosion of its functional and normative integrity during the financial crisis because of the lack of an obvious replacement.

Within economics the combined forces of Esther Duflo, Thomas Piketty, Emmanuel Saez Gabriel Zucman and others, however, provide the contours of a new (French) paradigm of economics increasingly capable of taking on the dominant monetarist paradigm. Within law in general and economic law specifically the contours of a new paradigm are however not yet in sight.

With the implosion of neoliberalism, it might however be time for legal scholarship to engage in the development of an alternative model of the law of political economy fit for the 21st century. A law that might have, among others, the following four elements as central building blocks. Elements which are implicit to The Law of Political Economy but also goes beyond on the book serving as natural next steps:

# The Return of Society

Margaret Thatcher famously twisted Karl Popper's variant of methodological individualism beyond recognition by stating, "there's no such thing as society". This proposition is at the very centre of the neoliberal *épistémè* and the problems facing the western part of world society can largely be traced back to this ontological starting position. The dominant worldview of the last four decades was derived from a methodologically individualist premise leading to the assumption that the sum of actions of individuals equals society. This unreflective jump from micro to macro pops up in legal discourses concerning everything from campaign financing in the US to EU competition law and policy.

The consequence is that both law and policy loses sight of systemic effects, asymmetric power and issues of societal integration. Hence, societal coherency and synchronization is not an issue because there is no concept of society available enabling an articulation of society as a social phenomenon in its own right. The starting point for a new law of political economy might therefore be found in the development of a concept of society that is compatible with legal reasoning and dispute resolution. Conceptually, this means that theories which entail a specific and in principle all-encompassing concept of society, such as both left and right Hegelian and left and right Luhmannian theories, could stand in front of a renaissance. In practical terms, it would moreover mean that overall societal impact, *i.e.* levels of socio-economic equality, territorial cohesion, and the broader societal impact of business activities beyond the creation of share value should and could obtain a more defining and decisive role in legal regulation.

# The End of An Anchor Nation: Global Law as Inter-legality

The history of world society from 1492 onwards is the history of consecutive western states (Spain, the Netherlands, the United Kingdom and the United States), acting as institutional anchors of the world economy. These states served as guarantors of the institutional formations enabling global economic exchanges, *i.e.* providing a global reserve currency, a willingness and capability to use force to maintain 'global order' and legal constructions justifying the existing order. The fundamental paradox of globalization is however that the intensification of global exchanges has resulted in an increase rather than a decrease in contextual diversity. A consequence is that, as the outgoing Governor of the Bank of England Mark Carney also stated recently, that the current centre, the US, cannot hold. The same, one might add, goes for the imaginary Anglo-American centre existing in the minds of Brexiters. The expansion and deepening of modernity, *i.e.* world society, obtaining dominance in ever-larger parts of the world means that the tragedy of the US is that it is too small to dominate the world and too big not to try. At the same time, neither China nor the EU are likely to be able to fill the gap. In legal terms, the consequence is that distinct worlds of law are on the rise. From trade and investment law to internet law no single global framework à la WTO Law or UN Law will take hold. Rather distinct EU, Chinese and US centric legal universes will be the norm.

Global law, including global economic law, is therefore not singular and hierarchical. Instead the core feature of global law is inter-legality. Global law is a de-centred form of in-between world's law, aimed at handling societal processes which are inter-contextual and inter-legal in nature. Maybe the most important example of this inter-legal setup is the law of global value chains, structuring and enabling global economic exchanges through connectivity norms. But also Europe, as the German Constitutional Court made clear recently, is a space of inter-legality. A feature which have deep roots as also the empires preceding the European Union can be understood as inter-legal constructions. Conflicts of laws methodology thereby become the central legal lens to observe both past and present global society through.

# Multi-rationality: Beyond Structural Marxism and Structural Liberalism

At the pages Verfassungsblog, Gunther Teubner recently made a case for a non-reductionist concept of surplus value, arguing that equivalents to profit maximization can be found in all function systems (*i.e.* education, politics, religion, science and so forth). Hauke Brunkhorst., coming from a left-Hegelian position, effectively made the same argument in 2014 arguing that the inbuilt contradictions and conflicts Marxists identify in the economy are present throughout society just as different functional systems like religion, the economy and education have been structurally dominant in different historical époques.

Three implications for the law of political economy can be derived from this insight:

1. Structural Marxism and structural Liberalism, *i.e.*, neoliberalism, are each other's mirror images. In the 1980s, structural liberalism succeeded structural Marxism as the fashionable ideology of the day. This however merely implied a switch from one side to the other of the same coin, in so far as both assume that society could be understood as being predominantly structured by economic interests and motivations, and that "society" can be equalled to the economy. Both ideologies saw and see the economy and private power, and not the state and public power, as the true driving-force of societal evolution, and, for both, state action ultimately remains guided by economic interests, leaving little autonomy for public power and law.
2. The failure to develop a non-reductionist theory of surplus value drives self-declared critical and left-leaning scholars into the dead end of methodological culturalism. The substitute of Marx in recent decades have been Karl Polanyi's The Great Transformation. A book that, in spite of all its qualities, engages in a critique of modern society on the basis of a highly idealized fiction of pre-modern society seeing a communitarian utopia as the only alternative to capitalism. Polanyi's historical reconstruction of the stages in the autonomisation of the economy and its reproductive logic and the consequences hereof is – like the Marxist approach – furthermore deeply skewed by the failure to recognize that strive for value surplus and tendencies of autonomisation and acceleration can be found throughout society and not just in the economy. Critiquing the implicit holism of market thinking based on equilibrium models, latter-day Polanyists merely end up substituting market holism with cultural holism by, for example, ontologically assuming the existence of chessboard style fixed national universes within which capitalist institution operates and moves or the existence of unbridgeable cultural divides between national cultures.
3. A third way can be found in the writings of Franz Leopold Neumann, understanding the *simultaneous* separation and re-connection of different spheres of society (economy, politics, religion, science etc.) through law. This give law and legal instruments a strategic position in society as the grid aimed at enabling and restraining societal exchanges while respective and nurturing the inner *Eigenlogik and rationality* of the economy, politics etc. An approach which, in contrast to a Luhmanian perspective, sees inter-systemic re-connection as constitutive as separation through differentiation.

# A New Form of Formalism: Law as Form Giving

Formalism in the classical sense is unlikely to have many supports among Verfassungblog readers. Going beyond classical formalism and the connotations associated with the concept and taking a broader societal perspective, law is however very much about form-giving. For a social exchange to be considered an economic exchange it needs to take place with the framework of a contract of similar legal form. For something to be considered a legitimate expression of political preferences, it needs to unfold within a voting procedure or other legally structured framework. In both cases it is the legal framing which transforms a generic social communication into something which we specifically can call an economic, political

or for that matter a scientific or religious phenomenon. In this particular sense, law gives form and thereby constitutes social phenomena and also in this particular sense we might say that it is not the political or the economic which constitutes the law it is the law which constitutes the political and the economy. This gives law, in spite of being blind to its own blind spots, a strategic location in society as the central infrastructural grid giving structure to world society.

Over the last decades, world society have, however, undergone immense increases of complexity, massive accelerations and spatial expansions. The amount of information published and stored, the pace of technological developments and the convolution of the challenges faces society go far beyond what law can absorb. The core characteristic of world society in recent decades is that social processes have blown the legal-institutional frames and forms that emerged in the immediate WWII period. Mass media has morphed into social media, economic products into experiences, multinational companies into global value chains and scientific contributions into blogposts. In short: The mess we are in are essentially about the absence of framing of social processes. Both constitutionally as well as in every legal field from company law to family law and environmental law the challenge is thus to increase the internal complexity, speed and reach of law in manner which enable it to capture loose social processes and give them a tight form. Informal governance and soft law arrangements, for example, which emerged due to the inadequacies of existing institutional forms needs a new tight legal form. The challenge posed both by neo-liberalism and its demise is thus mainly a surface problem as the law is faced with a far bigger challenge, namely to reinvent itself to stay relevant under the structural conditions of the 21st century.

The remainder of the contributions to this symposium picks up the baton from The Law of Political Economy: Transformation in the Function of Law while going a step further than the book by exploring the impact of the neoliberal paradigm on law and possible alternatives. Engaging more directly with the book, Florian Hoffmann pins out the differences but also surprising commonalities between ‘systems thinkers’ and ‘critical thinkers’ when it comes to diagnosing the current situation. In their contributions, Simon Deakin and Martijn Hesselink, on the other hand, take different positions on the role of neoliberalism in private law with Deakin arguing that law and economics represents the embodiment of neoliberal thinking in law while Hesselink questions the usefulness of paradigmatic categorisations. Sabine Frerichs changes the perspective by showing the diversity of political economy paradigms which might serve as access points for lawyers and legal analysis. Fernanda Nicola furthermore takes the social question seriously by making a plea for engaging in rigorous empirical analyses of the distributive effects of law. Cesare Pinelli makes a case for refocusing efforts on ‘traditional’ democratic constitutionalism of the sort that have been under pressure in recent decades in order to counter the incursion of societal power and the effects of contemporary governance. This is being mirrored by Joana Mendes which forcefully stresses that contemporary governance processes cannot be considered surrogates to democratic institutions and procedures. This links up to Jan Komárek’s plea to ”move beyond Fiesole” as the constitutional imaginary of European economic constitutionalism developed in the hills of Tuscany fails to grasp central constitutional questions of political economy. Finally but not least, Matthias

Goldmann sets out the parameters for a new paradigm of what he calls integrative liberalism as a possible substitute for the sort of financial liberalism characterizing the neoliberal époque.

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